

**BEFORE THE
DEPARTMENT OF PERSONNEL ADMINISTRATION
OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal by

Case No. 98-E-0073


Registered Nurse

For Reinstatement After Automatic Resignation

P. O. Box 6963

Napa, CA 94581

Represented by:

Vincent M. Spohn

Attorney at Law

P. O. Box 5748

Napa, CA 94581-0748

Respondent:

Department of Mental Health

Human Resources

1600 9th Street

Sacramento, CA 95814

Represented by:

Janet Steele

Labor Relations Analyst

Department of Mental Health

Napa State Hospital

2100 Napa Vallejo Highway

Napa, CA 94558-6293

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted as the Department's Decision in the above matter.

IT IS SO ORDERED:

August 24, 1998.



K. WILLIAM CURTIS


Chief Counsel

Department of Personnel Administration

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PROPOSED DECISION

This matter was heard before Mary C. Bowman, Hearing Officer, Department of Personnel Administration (DPA) at 10:00 a.m. on July 30, 1998, at Napa, California. A second day of hearing was proposed solely for the purpose of taking the testimony of . On August 12, 1998, appellant's counsel withdrew his request for an additional day of hearing and the matter was taken under submission.

Appellant was present and was represented by Vincent M. Spohn, her attorney.

Respondent, Department of Mental Health, was represented by Janet Steele, Labor Relations Analyst, Napa State Hospital.

Evidence having been received and duly considered, the Hearing Officer makes the following findings of fact and Proposed Decision.

I

JURISDICTION

Appellant automatically resigned effective March 14, 1998, and filed a request (appeal) for reinstatement after automatic resignation on April 4, 1998. The appeal complies with Government Code section 19996.2. The hearing was originally scheduled for June 4, 1998, but was continued at appellant's request with respondent's concurrence.

II

WORK HISTORY

Appellant was employed by the Department of Mental Health as a Registered Nurse. At the time of her automatic resignation, she was assigned to Napa State Hospital. She began working for the Department of Mental Health on September 9, 1988. She was a Licensed Vocational Nurse for a number of years until she was promoted to Registered Nurse on March 18, 1996.

III

CAUSE FOR APPEAL

Respondent notified appellant in writing on or about March 23, 1998, that effective March 31, 1998, she would be considered to have automatically (AWOL) resigned on March 14, 1998, based upon her unexcused absence from March 15 through 19, 1998. Thereafter, appellant filed her request for reinstatement with DPA claiming she had a satisfactory reason for being absent and not obtaining leave.

IV

REASON FOR BEING ABSENT

It was undisputed that on the evening of February 12, 1998, a medication pass audit was performed on appellant's dispensing of medication. The audit took place during the first half of the shift. Appellant passed the audit but did not return to work after her meal break. She testified she did not report back because she was upset that she had been subjected to a medication audit.

Appellant did not report back to work after February 12, 1998, either. During the period she was off work, she told other employees that she was too stressed to work.

At the hearing appellant submitted copies of visit verifications from Kaiser Permanente

which excused her from work from February 12 to February 16, 1998, and March 3, 1998. The verifications did not indicate the cause for appellant's absence. She also brought to the hearing an industrial injury visit verification stating she was "disabled from February 24 through February 27, 1998," due to an "adjustment disorder" and a visit verification dated March 12, 1998, stating she was seen on that date and could participate in a modified work program commencing March 16, 1998, with minimal contact with her supervisor for one week. The latter did not indicate a cause for being off work. These documents (most of which were not presented to respondent before her resignation) were considered uncorroborated hearsay. Even if they were not considered hearsay, they were not of a nature to demonstrate a satisfactory medical reason for appellant's absence between March 15 through 19, 1998.

No medical testimony was introduced to substantiate appellant's claim that she was too stressed or depressed to work between March 15 and March 19, 1998.

When asked why she was absent from work, appellant testified something to the effect of, "I was emotionally stricken by what they'd done to me;" "[t]hey put me on observation;" and "I felt harassed; broken hearted." She also testified, "[REDACTED] recommended I needed to stay home until I moved to another unit." (The latter was considered unsubstantiated hearsay and was not considered to prove the truth of the matter stated.)

The evidence was not sufficient to prove appellant had a medical reason requiring her to be off work between March 15 and 19, 1998.

V

REASON FOR NOT OBTAINING LEAVE

When appellant left work on February 12, 1998, she was on attendance restriction. Respondent placed her on a Level 1 Action Plan on April 7, 1997, and a Level 2 Plan on October 27, 1997. According to the Level 2 Plan, appellant was required to have all her sick leave usage substantiated by a physician and to call her supervisor each day of illness one hour before shift.

Appellant disagreed with the requirements imposed by the Level 2 Plan and refused to sign it. While it was in effect, she made several requests to transfer to another shift. According to the Nursing Coordinator, the requests were denied because of lack of openings on the other shift and due to "current performance issues and the action plan for high sick time usage."

([REDACTED] continued)

After appellant left her job on February 12, 1998, she called the workplace sporadically and usually spoke to employees (other than her supervisor) telling them she was sick. For example, on February 13, 1998, she spoke with [REDACTED], Senior Psychiatric Technician and said she would not be in. She acknowledged [REDACTED] told her she was supposed to call her supervisor and notify him she was sick. She testified she responded with something to the effect of "Why do I have to call in if I have a doctor's excuse?" Respondent claimed she called in on February 15, 1998, and spoke with [REDACTED], Psychiatric Technician. Appellant testified she did not remember talking to [REDACTED]. On February 17, 1998, the Unit Supervisor, [REDACTED], called her. Appellant testified he said, "You're supposed to call in sick every day." She also testified "I didn't pay attention to that because it didn't make sense."

Appellant spoke with the Acting Unit Supervisor on March 13, 1998, and stated she would be back on March 15. Between March 15 and 19, 1998, she did not report to work and she did not call. After that time, she failed to provide respondent with adequate medical substantiation for the absence between March 15 and 19.

Appellant acknowledged she was absent March 15 through 19, 1998, even though she had spoken with the supervisor on March 13 and stated she would be back. She also testified it did not make sense to her to have to call in when she had excuse slips from her doctor. When asked why she felt she did not need permission to be on leave status, she responded "I was so depressed, I did not want to do anything." However, a few minutes later when asked what prevented her from calling in sick, appellant testified, "It don't make sense to call in sick every day."

Respondent considered appellant absent without approved leave because of her failure to call and report her absences and her failure to provide medical substantiation for her absence between March 15 and 19, 1998.

The evidence proved that appellant was unwilling to comply with the reporting requirements by calling in timely each day and notifying her supervisor so that another nurse could cover for her. When she did not notify her employer of her absence, her employer did not have advance notice to fill behind her to ensure adequate shift coverage and patient care. She also failed to comply with the respondent's reasonable request that she substantiate any absence she considered medical in nature.

VI

READY, ABLE AND WILLING

Appellant testified she is not willing to report back to work unless she can be reassigned to a different shift supervisor. Appellant presented no evidence that she is currently medically or psychologically unable to work with her supervisor.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE HEARING OFFICER MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Government Code section 19996.2 provides an automatically separated employee with the right to file a request for reinstatement with the Department of Personnel Administration. Section 19996.2 also provides:

“Reinstatement may be granted only if the employee makes a satisfactory explanation to the department [DPA] as to the cause of his or her absence and his or her failure to obtain leave therefor, and the department finds that he or she is ready, able, and willing to resume the discharge of the duties of his or her position or, if not, that he or she has obtained the consent of his or her appointing power to a leave of absence to commence upon reinstatement.”

Pursuant to *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, the Court held that an employee terminated under the automatic resignation provision of section 19996.2, has a right to a hearing to examine whether he/she had a valid excuse for being absent, whether he/she had a valid reason for not obtaining leave and whether he/she is ready, able, and willing to return to work. DPA is *not* charged with examining whether the appointing power acted properly with regards to the actual termination. Further, appellant has the burden of proof in these matters and must prove by a preponderance of the evidence the he/she had a valid excuse for his/her absence and failure to obtain leave and that he/she is currently able to return to work.

Appellant did not provide a satisfactory explanation for being absent from work from March 15 through 19, 1998. Although she believed she was stressed and depressed because of the audit, she offered no medical evidence upon which the Hearing Officer could rely to demonstrate she was too ill to work.

(b)(6) continued)

Appellant did not provide a satisfactory explanation for not complying with reporting requirements for obtaining excused medical leave. In fact, appellant demonstrated she was unwilling to comply with the requirements of the action plan even though she was aware of its requirements. She did not call in between March 15 and 19, 1998 and left the supervisor with the misimpression she would be at work; and she did not provide her employer with medical substantiation for her absence. Appellant's conduct was unreasonable.

Appellant was unwilling to return to work except on her own conditions.

Accordingly, it is concluded appellant should not be mandatorily reinstated to the position of Registered Nurse with the Department of Mental Health. Appellant retains permissive reinstatement rights so long as she remains licensed.

* * * * *

WHEREFORE IT IS DETERMINED that the appeal of (b)(6) for reinstatement after automatic resignation from the position of Registered Nurse with the Department of Mental Health, effective March 14, 1998, is denied.

* * * * *

The above constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the Department of Personnel Administration as its decision in the case.

DATED: August 20, 1998



MARY C. BOWMAN
Hearing Officer
Department of Personnel Administration